

NO. 83-2161

In The
Supreme Court of the United States
October Term, 1984

STATE OF MONTANA, et al.,
Petitioners,
v.

BLACKFEET TRIBE OF INDIANS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

**BRIEF FOR THE CROW TRIBE OF INDIANS
AS AMICUS CURIAE**

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INTEREST OF AMICUS CURIAE

Amicus Curiae Crow Tribe of Indians is the beneficial owner of vast mineral resources, especially coal, located within both the acknowledged boundaries of the 2,500,000 acre Crow Indian Reservation and a 1,100,000 acre tract immediately to the north of the acknowledged Reservation known as the "ceded strip" or "ceded area." In 1975, Montana enacted a severance tax on the production of coal and a gross proceeds tax on the sale of coal. Mont. Code Ann. §§ 15-35-101 through 15-35-111 and 15-23-701 through 15-23-704. The rate of the severance tax varies from three to thirty percent of the value of the coal, depending upon the quality of the coal and how it is mined. Mont. Code Ann. § 15-35-103. It was specifically intended to enable the State of Montana to share in the profits associated with the extraction of coal, to obtain the maximum economic rent from the production and sale of coal, and to slow the growth of coal production in Montana. Mont. Code Ann. § 15-35-101; *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 639-41 (1981) (Blackmun, J. dissenting); *Crow Tribe v. Montana*, 650 F.2d 1104, 1113 (9th Cir. 1982), *modified*, 665 F.2d 1390 (9th Cir. 1982), *cert. denied*, 459 U.S. 916.

Crow coal on the ceded strip has been mined since 1974 pursuant to a 1938 Act lease. Since 1975, that coal has been taxed at the maximum statutory rate of 30 percent. In addition, the Tribe's lessee has paid Montana's gross proceeds tax at a rate of approximately five percent of the value of the coal. From 1976 through 1982, the Tribe's lessee paid approximately \$55,000,000 in state coal taxes as compared with approximately \$14,400,000 in royalties to the

Tribe. Moreover, since 1975, the production of coal in Montana has remained relatively constant at approximately 20 to 30 million tons per year whereas the similar coal produced in Wyoming, whose coal taxes are approximately half those of Montana's,¹ increased from about 25 million tons per year to more than 100 million tons. See the graph reproduced in the Appendix to this Brief.²

The Crow Tribe brought suit against the State of Montana in 1978 to invalidate Montana's entire severance and gross proceeds taxes as applied to the production and sale of both Reservation coal and the Tribe's coal located within the ceded strip. That case is now pending for decision before the United States District Court for the District of Montana (*Crow Tribe v. Montana*, Civil No. 78-110 BLG) following remand from the United States Court of Appeals for the Ninth Circuit (*Crow Tribe v. Montana*, 650 F.2d 1104 (9th Cir. 1981), *modified*, 665 F.2d 1390 (9th Cir. 1982), *cert. denied*, 459 U.S. 916), and a 2½ week trial held in January 1984. The Crow Tribe has a direct stake in the outcome of the instant case because Montana has defended its taxes on Crow coal on the grounds, *inter alia*, that state taxes on the coal produced under the May 11, 1938 Indian Mineral Leasing Act, 25 U.S.C. §§ 396a *et seq.* (Pet. App. 175), are authorized by the Act of February 28, 1891, 25 U.S.C. § 397 (Pet. App. 150), as amended by the Act of May 29, 1924, 25 U.S.C. § 398 (Pet. App. 152). Similar issues are involved in this case.

¹ See *Commonwealth Edison Co. v. Montana*, *supra*, 453 U.S. at 640 n.5 (Blackmun, J. dissenting).

² The graph reproduced in the Appendix is based on public information obtained from the Keystone Coal Industry Manual and the National Energy Information Center of the Department of Energy.

The petitioners and the respondent have consented in writing to the filing of this Amicus Curiae Brief by the Crow Tribe. Copies of those letters are being lodged with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The sole question presented by this case is whether states are legally authorized to impose taxes on tribal royalties obtained under the terms of mineral leases executed pursuant to the Act of May 11, 1938, 25 U.S.C. §§ 396a-396g (Pet. App. 175). Since states cannot tax Indian income or Indian property in the absence of express congressional authorization, *Bryan v. Itasca County*, 426 U.S. 373, 375-76 and n.2 (1976); *McClanahan v. Arizona Tax Comm'n.*, 411 U.S. 164, 170-71 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), the dispute in this case is limited to the legal issue of whether "Congress has expressly provided that state laws shall apply." *Bryan v. Itasca County*, *supra*, 426 U.S. at 376 n.2; *McClanahan v. Arizona Tax Comm'n.*, *supra*, 411 U.S. at 170-71.

Different tests and principles are involved when states tax the conduct, property or activities of non-Indians engaging in Indian related commerce. Such cases call for "a particularized [factual] inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law" and is therefore pre-empted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). Because this case involves only a challenge to the applicabil-

ity of state taxes on tribal royalties (as opposed to a claim that the entire state taxes on tribal oil and gas is pre-empted by federal Indian law), there has not been an occasion or an opportunity to develop a factual record concerning the impact of Montana's oil and gas taxes on the particular state, federal and tribal interests at stake in the development of tribal oil and gas by non-Indian producers. Cf. *New Mexico v. Mescalero Apache Tribe*, — U.S. —, 103 S.Ct. 2378 (1983); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, *supra*.

2. This distinction assumes particular importance in the context of this case owing to Section 7 of the 1938 Indian Mineral Leasing Act, 52 Stat. 347, 348 (Pet. 6; Pet. App. 175), which states: "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed."³ Under this provision, even if the consent to tax provision of the 1891/1924 Act applies generally to 1938 Act leases, the door is open for Indian tribes and/or the United States to prove in the context of a specific factual setting that a particular state tax is inconsistent with the 1938 Act and therefore violates federal law.

One of the express purposes of the 1938 Act was "to give the Indians the greatest return from their property." H.R. Rep. No. 1872, 75th Cong., 3d Sess. at 3 (1938); S. Rep. No. 985, 75th Cong., 1st Sess. at 3 (1937). It is inconceivable that the Congress intended to permit state taxes on tribal mineral production which prevent or discourage the development of tribal minerals and result in a

³ Section 7 is not codified in the United States Code. See 25 U.S.C.A. § 396a (historical note).

state receiving revenues that are 400 percent greater than the royalties paid to the tribe. Section 7 of the 1938 Act operates as an express repeal of the 1924 tax consent provision to the extent necessary to carry out the purposes of the 1938 Act.

Admittedly, this issue is not directly presented by the limited challenge to Montana's taxes on tribal royalties presented in this case, but the operative effect of Section 7 in the broader Indian pre-emption context nevertheless should be kept in mind in considering the relationship between the 1938 Act and the tax proviso to the 1924 Act. A decision against the Blackfeet Tribe in this case should not foreclose a tribe or the United States from contending and proving that any particular state tax is inconsistent with the 1938 Act and that Section 7 of the 1938 Act repeals the tax proviso to the 1924 Act to the extent that any such tax previously might have been sanctioned by that proviso.

3. Prior to 1938, there was a hodgepodge of several different Indian mineral leasing statutes which imposed different requirements on different Indian lands. One of the specific purposes of the 1938 Act was "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." H.R. Rep. No. 1872, *supra*, at 1; S. Rep. No. 985, *supra*, at 2. This objective would be defeated if portions of the prior laws remained applicable to some, but not all, of the Indian lands that are subject to lease pursuant to the 1938 Act. The particular situation of the Crow Tribe illustrates the difficulty, the senselessness and the lack of uniformity that would result from upholding the petitioners' position.

ARGUMENT

I. The 1924 Consent To Tax Proviso Is Expressly Repealed By Section 7 Of The 1938 Act To The Extent Necessary To Carry Out The Purposes Of The 1938 Act.

In enacting the 1938 Indian Mineral Leasing Act, Congress recognized that some prior laws might be inconsistent with the policies and objectives underlying the new law. Accordingly, Section 7 of the 1938 Act, 52 Stat. 347, 348 (Pet. App. 175) (uncodified) provides that "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed." Under Section 7 prior federal laws, including the consent to tax proviso in the 1924 Act, must give way to the extent necessary to effectuate the purposes and policies of the 1938 Act.

The 1938 Act was intended to "bring all [Indian] mineral leasing matters in harmony with the Indian Reorganization Act" (IRA) of 1934, 25 U.S.C. §§ 461 *et seq.* H.R. Rep. No. 1872, 75th Cong., 3d Sess., at 3 (1938); S. Rep. No. 985, 75th Cong., 1st Sess. at 3 (1937). The broad policies of the IRA were "to foster tribal self-government and economic development." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980). See also, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 n.10 (1980); *Fisher v. District Court*, 424 U.S. 332, 387 (1976); *Morton v. Mancari*, 417 U.S. 535, 542 (1974). One of the express purposes of the 1938 Act, which also conforms to the policies of the IRA, was "to give the Indians the greatest return from their property." H.R. Rep. No. 1872, *supra*, at 2; S. Rep. No. 985, *supra*, at 2.

Thus, state mineral taxes that deprive Indian tribes of substantial revenues and have the effect of preventing

or discouraging the development of tribal minerals are manifestly inconsistent with the objectives of the 1938 Act. See *Crow Tribe v. Montana*, *supra*, 650 F.2d at 1112-14; *supra* at 1-2, 4-5. The Crow Tribe agrees with the position of the Blackfeet Tribe that 1924 tax proviso has no application at all to 1938 Act leases. Even if it is assumed, however, that the 1924 tax proviso continues to apply to some taxes on 1938 Act leases, it does not necessarily follow that the 1924 Act sanctions all such state taxes. Section 7 of the 1938 Act expressly repeals the 1924 Act to the extent that any of its provisions are inconsistent with the purposes of the 1938 Act.

Amicus Crow Tribe recognizes that the instant case only involves a limited challenge to Montana's taxes on the production of oil and gas as applied to the Blackfeet Tribe's royalty interest. See *supra* at 3-4. But the operative effect of Section 7 in the broader Indian pre-emption context nevertheless should be kept in mind in considering the relationship between the 1938 Act and the tax proviso to the 1924 Act. While the Crow Tribe fully supports the position of the Blackfeet Tribe, it should be recognized that a decision against the Tribe in this case should not foreclose a tribe or the United States from contending and proving that: (a) any particular state tax is inconsistent with the 1938 Act; (b) that the 1924 Act does not sanction any such tax in light of Section 7 of the 1938 Act; and (c) that any such tax violates applicable federal law and is therefore pre-empted under the principles of *New Mexico v. Mescalero Apache Tribe*, — U.S. —, 103 S.Ct. 2378 (1983); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Merrion v. Jicarilla Apache Tribe*, 455

U.S. 130, 158 n.26 (1982); and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

II. Upholding The Petitioners' Position Would Thwart The Uniformity Purpose Of The 1938 Act.

Prior to 1938, several different Indian mineral leasing laws imposed different requirements on different Indian lands. See H.R. Rep. No. 1872, *supra*, at 1; S. Rep. No. 985, *supra*, at 1-2. One of the specific purposes of the 1938 Act was to correct this problem by "obtain[ing] uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." *Ibid.* This purpose was achieved by enacting a new law, the 1938 Act, which specifically applies to all "unallotted lands within any Indian reservation" regardless of how the reservation was established as well as to any "lands owned by any tribe, group, or band of Indians under Federal jurisdiction" except for those tribal lands that are specifically excluded from the provisions of the 1938 Act by Section 6, 25 U.S.C. § 396f. 25 U.S.C. § 396a. In addition, the new law was expressly made applicable to mineral leases made "hereafter," i.e. "on or after May 11, 1938." 25 U.S.C. § 396a.⁴ On its face the 1938 Act is comprehensive and

⁴ The statute provides that "hereafter, unallotted lands . . . may . . . be leased for mining purposes . . ." The word "hereafter" was changed to "on and after May 11, 1938" when the statute was codified.

stands entirely on its own. The plain language of 25 U.S.C. § 396a and the rest of the 1938 Act, read in light of the objective of achieving uniformity, leave no doubt that Congress did not intend to incorporate any provisions of the preexisting statutory hodgepodge.

If the petitioners' position is upheld, the uniformity purpose of the 1938 Act would be defeated. In order to determine whether states are authorized to tax tribal royalties or production from tribal leases under the 1938 Act, courts would have to examine the tax provisions of the pre-1938 laws. There are obvious and large gaps in the coverage of these provisions.

For example, the only general, pre-1938 statute authorizing mineral leases of unallotted Indian lands within statutory reservations established unilaterally by Congress is the Act of June 19, 1919, 25 U.S.C. § 399. This Act is restricted by its terms to nine named states. States with substantial Indian lands, including, Utah, Colorado, South Dakota, North Dakota, Minnesota and Wisconsin, among others, are excluded from its coverage. The tax provision of this statute differs markedly from the 1924 Act and obviously would not be sufficient to permit taxation of tribal royalties. It states:

Protection of interests of Indians. The Secretary of the Interior is authorized to perform any and all acts and to make such rules and regulations not inconsistent with this section as may be necessary and proper for the protection of the interests of the Indians and for the purpose of carrying the provisions of this section into full force and effect: *Provided*, that nothing in this section shall be construed or held

to affect the right of the States or other local authority to exercise any rights which they may have to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee.

This provision appears to do nothing more than insure that the Secretary's rules and regulations have no effect on otherwise valid state taxes on non-Indian lessees. Thus, it appears that the output of mines located on tribal lands within all statutory reservations would not be subject to any congressionally authorized state taxes. It would be anomalous and anything but uniform to permit state taxes on tribal royalties on treaty reservations but not on reservations established by unilateral acts of Congress.

Mineral lands located outside the boundaries of Indian reservations are another example of a major gap in the pre-1938 law. Cf. 30 U.S.C. §§ 1291(9), 1300. The tax authorizations in both the 1924 Act, applicable to "bought and paid for" lands, and the 1927 Act, 25 U.S.C. § 398c, applicable to the lands established by Executive Order, are expressly limited to the output of mines or wells located "on" or "within" Indian reservations. This creates a truly anomalous situation under which, if the petitioners prevail, tribally owned, off-reservation minerals would not be subject to any congressionally authorized state taxes while states would be able to tax tribal mineral production as well as tribal royalties on the reservation pursuant to the tax provisions of the 1924 and 1927 Acts. Cf. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

A third major gap in pre-1938 law relates to the taxation of tribal minerals other than oil and gas on Executive Order Reservations. The production of oil and gas on such reservations presumably would be subject to state taxes

pursuant to the 1927 Act, 25 U.S.C. §§ 398a, 398c if the petitioners prevail here. But the production of other minerals on such reservations within the nine listed states pursuant to the 1919 Act, 25 U.S.C. § 399, apparently would not be subject to any congressionally authorized state taxes.

These anomalies are illustrative of the problems, uncertainties, difficulties and havoc that would be created by a ruling upholding the petitioners' position. Nor is it at all certain that such problems would be limited to tax questions. If the tax proviso to the 1924 Act is carried forward and applied to 1938 Act leases, there is no apparent justification for denying similar treatment to other provisions of pre-1938 laws. This, of course, is exactly what Congress attempted to avoid by making leases on or after May 11, 1938 on all Indian lands except those specifically excepted subject to uniform treatment.

The particular situation of the Crow Tribe also illustrates the uncertainty and lack of uniformity that would be created if the petitioners' position is upheld. Mineral leasing on the Crow Reservation was the specific subject of a pre-1924 statute, Section 6 of the Crow Allotment Act of June 4, 1920, 41 Stat. 751, 753, as amended by the Act of May 26, 1926, 44 Stat. 658, 659. These provisions make no mention of state taxes. It is doubtful whether the 1924 Act was ever applicable to the Crow Reservation. This conclusion is strengthened by the express exclusion of the Crow Reservation from the 1938 Act, 25 U.S.C. § 396f, presumably because the leasing of Crow minerals was governed by the specific provision in the Crow Allotment Act. See F. Cohen, *Handbook of Federal Indian Law* 329 n.471

(1942 ed.)⁵ It was not until 1959 that Congress subjected Crow mineral leasing to the 1938 Act. Act of September 16, 1959, 73 Stat. 565. *See also*, Act of May 17, 1968, 82 Stat. 123. These subsequent laws do not mention or refer to state taxes or to the 1924 Act. Needless to say, if Crow mineral leasing was never made subject to the 1924 Act, the tax proviso to that Act cannot possibly be construed as authorizing state taxation of Crow mineral production. Moreover, as previously noted, the Crow Tribe's off-reservation minerals, are not made subject to any Congressionally authorized state taxes.

Whether or not Crow mineral development was ever subject to the 1924 Act should now be a moot point. Congress has passed a new law designed to implement different policies and to be applied uniformly without regard to outmoded distinctions. In 1938, Congress clearly intended to eliminate the ghosts that had haunted the past by starting over on a clean slate. That purpose would be frustrated by reading the 1938 Act as incorporating or carrying forward the consent to tax proviso to the 1924 Act.

⁵ *British American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159 (1936), is not to the contrary. The primary basis for the Court's conclusion that the Blackfeet oil and gas leases in question in that case were granted under both the general 1891 and 1924 statutes and the specific Blackfeet mineral leasing statute was that the leases expressly recited that they were issued under the 1891 and 1924 Acts. Further, the terms of Section 6 of the Crow Allotment Act are considerably more detailed and specific than the more general provisions of the Blackfeet statute and are also inconsistent with some provisions of the 1924 Act. Until recently, Crow minerals were subject to a different and separate set of leasing regulations that were issued pursuant to Section 6 of the Crow Allotment Act. 25 C.F.R. p.173 (1979)

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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MONTANA AND WYOMING COAL PRODUCTION 1970 - 1982

